

# GENDERING ECONOMIC AND FINANCIAL GOVERNANCE THROUGH POSITIVE ACTION MEASURES: THE COMPATIBILITY OF THE FRENCH REAL EQUALITY MEASURE WITH THE EUROPEAN UNION FRAMEWORK

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## Abstract

*The number of female directors on the boards of large listed companies in the European Union (EU) is very low and progress towards equal participation and representation of women and men on company boards has been extremely slow. In the aftermath of the recent global financial crisis, the lack of gender diversity on corporate boards has become less justifiable. In response to the clear need for change, a number of European countries and the EU have adopted or proposed the introduction of various positive action measures designed to tackle the gender imbalance on corporate boards. This article compares and contrasts the methods used in France and the EU to achieve a better gender balance on company boards. It questions the applicability of the French measures within the EU and suggests that the French approach is compatible with EU law and is also wide reaching in its coverage of executive as well as non-executive directors. It arguably underpins a shift from gender equality to a broader approach of democratic legitimacy for entities that affect citizens' life. As such, the French approach goes further than the proposed EU directive and it has the potential to be used as a model within the EU.*

**Keywords:** gender equality; quotas; positive action; company law; European Union law; French law

## §1. INTRODUCTION: A GLOBAL MOVE TOWARDS GENDER EQUALITY

Global trends in gender equality currently focus on enhancing the gender balance in decision making. Specifically, gender balance on corporate boards is fast becoming a legitimate policy goal.<sup>1</sup> The percentage of women in senior management varies globally, yet remains

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<sup>1</sup> L. Senden and M. Visser, 'Balancing a Tightrope: The EU Directive on Improving the Gender Balance among Non-Executive Directors of Boards of Listed Companies', 1 *European Gender Equality Law Review* (2013), p. 17-33; J.C. Suk, 'Democratic Deficits and Gender Quotas: The Evolution of the Proposed EU Directive on Gender Balance on Corporate Boards', *Foundation for Law, Justice, and Society Policy Brief* (2014), <http://www.fljs.org/democratic-deficits-and-gender-quotas>.

consistently low: 5% in Japan, 14% in India, 18% in North America, 22% in Latin America, 24% in Europe and in Australia, 25% in China, 28% in South Africa and New Zealand, 31% in Turkey, 32% in the ASEAN region and 46% in Russia.<sup>2</sup> The number of female directors on the boards of large listed companies in the European Union (EU) is low at 16.6%.<sup>3</sup> However, a number of influential positions in the financial and banking sectors have been filled by women over recent years.<sup>4</sup> At the global level, less than 10 in 177 central bankers are women.<sup>5</sup> This is illustrated in the disproportionate representation of women in senior management in the four main European central banks: women represented 44% of senior management in the Bank of England in 2012, 28% in the Banque de France in 2013, 21% in the Bundesbank in 2011 and only 14% in the European Central Bank in 2012.<sup>6</sup> These statistics highlight the disconnect between women's education and employment rate<sup>7</sup> and their conspicuous absence at the highest level of decision-making in business, the so-called 'glass ceiling'.

Balanced representation in the political sphere has been relatively easy to justify on the basis of citizenship and equal representation,<sup>8</sup> yet the legitimacy of legal intervention in the political sphere is not easily applied to the economic sphere. Gender representation measures are usually not contested in state-owned enterprises and many EU Member States have rules regarding the balance of gender participation on the boards of state-owned companies. In contrast, legal measures that apply to privately owned companies have been met with harsh criticism and complaints about compatibility with EU law and the principle of gender

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<sup>2</sup> Grant Thornton International, 'Women in senior management: still not enough', *Grant Thornton International Business Report* (2012), p. 5.

<sup>3</sup> European Commission, 'Women and Men in Leadership Positions in the European Union: A Review of the Situation and Recent Progress', (2013), [http://ec.europa.eu/justice/gender-equality/files/gender\\_balance\\_decision\\_making/131011\\_women\\_men\\_leadership\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/131011_women_men_leadership_en.pdf), p. 6.

<sup>4</sup> Christine Lagarde joined the IMF as Managing Director in July 2011. An increasing number of women are heading national Central Banks as president. Since 2013, Janet Yellen is Chairman of the Board of Governors of the United States of America Federal Reserve System; Elvira Nabiullina is Chairperson of the Central Bank of Russia; Karnit Flug is Chair of the Israel Central Bank; and Danièle Nouy is the chair of the supervisory board of the European Central Bank. In 2014, Chrystalla Georgiadji was appointed as Chairperson of the Cyprus Central Bank.

<sup>5</sup> N. Renaud, 'Le superviseur bancaire européen sera une femme', *Les Echos*, 22 October 2013, [http://www.lesechos.fr/22/10/2013/LesEchos/21548-116-ECH\\_le-superviseur-bancaire-europeen-sera-une-femme.htm](http://www.lesechos.fr/22/10/2013/LesEchos/21548-116-ECH_le-superviseur-bancaire-europeen-sera-une-femme.htm).

<sup>6</sup> J.-P. Lacour, 'A Francfort, les femmes prennent le contrôle de la supervision bancaire', *Les Echos*, 7-8 March 2014, <http://www.lesechos.fr/monde/europe/0203356657713-a-francfort-les-femmes-prennent-le-contrôle-de-la-supervision-bancaire-655155.php>.

<sup>7</sup> On average 34% of working women have tertiary-level education compared to only 24% of working men and 46% of employed people across the EU: M. Teichgreaber, 'Eurostat Labour Force Survey 2012', *Eurostat* (2013).

<sup>8</sup> E. Lépinard, 'For Women Only? Gender Quotas and Intersectionality in France', 9 *Public & Gender* (2013), p. 276-298.

equality.<sup>9</sup> State intervention in the composition of company boards is often seen as unwarranted interference in the employers' discretionary power. Moreover, such measures are claimed to 'run counter to the responsibility of shareholders (...) and, by cutting across their choice of candidates, dictate elements of the composition of the board which is to be accountable to them'.<sup>10</sup>

However, with the global financial crisis it is harder to sustain such arguments. The lack of gender diversity on corporate boards and the potential significance of this were highlighted by the International Monetary Fund's (IMF) Managing Director, Christine Lagarde in 2010. She declared that 'if Lehman Brothers had been "Lehman Sisters", today's economic crisis clearly would look quite different'.<sup>11</sup> Lagarde added that she wished 'that there were more women in finance (...) [as the economy] would be much healthier'. Sylvia Walby ventures that the monoculture of decision-making in financial companies is a possible reason behind the failure of financial institutions to govern in the best possible manner.<sup>12</sup>

There is business justification for state intervention in the composition of corporate boards. Such rules are necessary in order to create 'diversity' on the boards of companies, which ultimately contributes to commercial effectiveness.<sup>13</sup> An array of researchers in various fields, ranging from economics to finance to behavioural management, has sought to assess whether diversity on corporate boards leads to financial success. While the studies are not unanimous in their outcome, some have found a link between corporate board diversity and key performance measures behind shareholder wealth.<sup>14</sup> For instance, a study by Credit Suisse on

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<sup>9</sup> See R.C. Tobler, 'Going Global in Sex Equality Law. The Case of Gender Representation Rules for Company Boards', in M. Monti et al. (eds.), *Economic Law and Justice in Times of Globalisation* (Nomos, 2007), p. 891-916; M. Szydło, 'Gender equality on boards of EU Companies: Between economic efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance', 21 *European Law Journal* (2013), p. 97-115.

<sup>10</sup> Corporations and Markets Advisory Committee, 'Diversity on Boards of Directors', *Australian Government* (2009), [www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/\\$file/Board\\_Diversity\\_B5.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/$file/Board_Diversity_B5.pdf), p. 48-49.

<sup>11</sup> Responding to Niall Ferguson's question about whether there would have been a financial crisis had more women been in senior positions. <http://www.thedailybeast.com/videos/2012/03/09/christine-lagarde-if-lehman-brothers-had-been-lehman-sisters.html>.

<sup>12</sup> S. Walby, 'Gender Quotas for Boards of Directors: Gendering Economic Governance in a Time of Financial Crisis', presented at Council for European Studies Conference, Amsterdam, 26 June 2013, p. 2.

<sup>13</sup> H. Hodgson et al., 'Targets and Quotas – Perspective paper', *Workplace Gender Equality Agency, Commonwealth Government of Australia* (2013).

<sup>14</sup> See also: G. Desvaux, S. Devillard-Hoellinger and P. Baumgarten, 'Women Matter: Gender Diversity. A Corporate Performance Driver', *McKinsey and Company* (2007), [www.asx.com.au/documents/media/women\\_matter\\_english.pdf](http://www.asx.com.au/documents/media/women_matter_english.pdf); T. Barta, M. Kleiner, and T. Neumann, 'Is there a Payoff from top team diversity?', *McKinsey Quarterly* (2012), [http://www.mckinsey.com/insights/organization/is\\_there\\_a\\_payoff\\_from\\_top-team\\_diversity](http://www.mckinsey.com/insights/organization/is_there_a_payoff_from_top-team_diversity); L. Joy et al., 'The

large companies between 2005 and 2011 found that companies which have women on their board of directors tend to perform better, with a higher return on equity, lower gearing and better average growth.<sup>15</sup> As such, it is arguable that the appointment of female directors might be necessary to maximize shareholder wealth. Although citing this corporate goal might help to reduce the business' hostility to gender participation rules, the need for state intervention to enhance shareholders' interests and returns is still open to question.

State intervention in a domain normally falling within the employer's autonomy might be more appropriately justified on the basis of combatting gender inequality, gender-biased prejudices and stereotypes, all of which are legitimate aims of the EU and its Member States.<sup>16</sup> The difficulty here is that the removal of the glass ceiling through gender balance measures is often viewed as circumventing the principle of workplace progression through individual merit. Corporate board membership is generally perceived as an employment relationship, where equality principles are embedded in 'objective' criteria of fairness and merit. Yet, board participation cannot always be considered an employment relationship.

State intervention in the composition of corporate boards can also be justified as a matter of democracy, representing an important step toward a more equal and fair society where powers and resources are more evenly distributed.<sup>17</sup> There is no doubt that companies inevitably shape society through their actions. The increasing interaction and interdependence between the economic and political spheres means that companies' decision-making must reflect the composition of society.<sup>18</sup> Thus, the requirement of gender balance in financial and economic

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Bottom Line: Corporate Performance And Women's Representation On Boards', *Catalyst* (2007), [www.catalyst.org/system/files/The\\_Bottom\\_Line\\_Corporate\\_Performance\\_and\\_Womens\\_Representation\\_on\\_Boards.pdf](http://www.catalyst.org/system/files/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf), cited in D.L. Rhode and A.K. Packel, 'Diversity on Corporate Boards: How Much Difference Does Difference Make?', *Rock Center for Corporate Governance at Stanford University Working Paper No. 89* (2010), [http://68.234.80.80/CorporateGovernance/diversity\\_on\\_corporate\\_boards\\_difference.pdf](http://68.234.80.80/CorporateGovernance/diversity_on_corporate_boards_difference.pdf), p. 4-5; S. Vinnicombe et al., 'The Female FTSE Report 2004', *Center for Developing Women Business Leaders, Cranfield School of Management* 1 (2004), <http://www.europeanpwn.net/files/ft2004finalreport.pdf>. These studies are disputed however. See for instance R. Adams and D. Ferreira, 'Women in the boardroom and their impact on governance and performance', 94 *Journal of Financial Economics* (2009), p. 291-309; F. Dobbin and J. Jung, 'Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?', 89 *North Carolina Law Review* (2011), p. 809-838.

<sup>15</sup> M. Curtis, C. Schmid and M. Struber, 'Gender Diversity and Corporate Performance', Credit Suisse Research Institute (2012), [https://www.credit-suisse.com/newsletter/doc/gender\\_diversity.pdf](https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf).

<sup>16</sup> M. Szydlo, 21 *European Law Journal* (2013).

<sup>17</sup> S. Laulom, 'France', in S. Selanec and L. Senden (ed.), *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards* (European Network of Legal Experts in the Field of Gender Equality and European Commission, 2012), p. 86.

<sup>18</sup> S. Walby, 'Finances versus Democracy: Theorizing Finance in Society', 27 *Work, Employment and Society* (2013), p. 489-507.

leadership (and elsewhere) is not merely about redressing past and present disadvantages for women but more importantly about establishing a system of good governance based on democratic principles.<sup>19</sup>

In response to the clear need for change, regulatory provisions mandating or recommending gender balance on corporate boards are increasingly being adopted across the globe.<sup>20</sup> This trend was initiated by Norway which enacted gender representation legislation in 2003. In 2012, The European Commission adopted a proposed directive on improving the gender balance among non-executive directors of companies listed on stock exchanges ('the proposed directive'), which aims towards a figure of 40% of the under-represented sex in non-executive board positions by 2020.<sup>21</sup> Within the EU, a number of Member States have started to implement such rules. The French legislator adopted legislation in January 2011 and August 2014 requiring a range of listed companies to have 40% of female directors by 2017<sup>22</sup> or 2020<sup>23</sup> depending on the case.

The adoption of the proposed directive has sparked controversy and criticism.<sup>24</sup> In particular, it has been argued that the proposal is not consistent with the principles on positive action

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<sup>19</sup> J.C. Suk, 'Gender Quotas after the End of Men', 93 *Boston University Law Review* (2013), p. 1123-1140, 1125.

<sup>20</sup> In 2003, Norway enacted a law that mandated every public company to have, at least 40% women on their board by 2008. The consequence of non-compliance was delisting and dissolution of the company. In Asia for instance, the Indian Parliament introduced the Companies Bill, 2012, which seeks to include at least one female director on the board of directors of a number of companies; see A. Kamalnaath and Y. Peddada, 'Women in Boardrooms: Formulating a Legal Regime for Corporate India', 1 *Journal on Governance* (2012), p. 675-694. The Malaysian Code of Corporate Governance, 2012 requires public companies to have at the least 30% women on their boards by 2016. For an Asian perspective on corporate quotas, see A. Kamalnaath and A. Masselot, 'Women on board: The unlikely convergence of Europe and Asia on corporate quotas law', *European Union Studies Associations Asia Pacific (EUSA AP)* (2014). In Australia, see D. Branson, 'An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors', *University of Pittsburgh Legal Studies Research Paper No. 2012-13* (2012), <http://ssrn.com/abstract=2064087>, p. 5. For a perspective on New Zealand, see: T. Brand and A. Masselot, 'Diversity, Quota and Compromise in the New Zealand Boardroom: possible way forwards', 3 *Centre for European Law and Legal Studies (CELLS) Working Paper* (2014), <http://www.law.leeds.ac.uk/assets/files/Masselot-Maymont-CELLS-online-paper---vol-3---quotas-on-boards.pdf>.

<sup>21</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, 14 November 2012, COM(2012) 614 final

<sup>22</sup> L. n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle, Article 5, I.

<sup>23</sup> Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes, Article 67, III.

<sup>24</sup> The EU proposal faces opposition as EU Member States are divided with regard to the methods to be used for addressing the lack of women in company boards. On the one hand, 11 Member States as well as Norway have already introduced legally binding instruments designed to promote gender equality on company boards. In eight of these countries, the instruments cover public undertakings. On the other hand, in the remaining two-thirds of

measures established by the Court of Justice.<sup>25</sup> As the French legislation goes further than the EU proposal, it necessarily raises the issue of compatibility with EU principles on positive action measures. The issue of consistency with EU law is not only controversial but also key to understanding and setting the agenda for the evolution of gender equality in Europe and beyond to establish a system of good governance where citizens can recognize themselves in the institutions. This article compares and contrasts the French and the EU methods used to achieve a better gender balance on company boards. It contextualizes the ‘accepted’ principles of positive actions under EU law and their compatibility with the proposed directive. It argues that the French legislation is not only in line with EU principles on gender equality but also provides leadership in this field.

This article starts by considering some of the terminology surrounding the concept of positive action. Positive action measures contrast with other concepts, such as reverse and positive discrimination. Arguably, the inconsistent use of these terms creates an unhelpful and confusing legal environment. As the legal concepts are complex, even for specialists, Section 2 endeavours to cast some light on the various concepts and their boundaries. Section 3 provides a background to the proposed EU directive and its boundaries under the EU legal framework. Section 4 outlines the French legislation on real equality between men and women. Finally there is a review of the significant differences between the methods used by the French and the EU legislators in Section 5. We consider the compatibility of the French model with the EU legal framework. We show that the French approach is more far reaching in its material and personal scopes, and due to this breadth, is not only marginally more effective than the proposed directive in terms of achieving gender equality but also and more importantly, it arguably contributes to the establishment of good governance and democratic legitimacy for institutions which affect citizens’ lives.

## **§2. POSITIVE ACTION MEASURES AND OTHER CONCEPTS**

The implementation of substantive equality includes the provision of specific advantages to underrepresented individuals belonging to a designated group in order to increase their proportional representation in a relevant area (such as employment or education) with a view

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the Member States, no legal measures have been introduced and no significant progress has been made in recent years. Unsurprisingly, Member States which have opted for self-regulation oppose the proposal.

<sup>25</sup> M. Szydło, 21 *European Law Journal* (2013).



to redress past and present societal discrimination toward this group.<sup>26</sup> Such measures go beyond the traditional concept of formal equality, which requires that men and women be treated consistently according to the same standard,<sup>27</sup> and does not require the presence of discrimination on an individual basis. Moreover, these measures aim to challenge deeply ingrained social practices that reproduce structural or systemic inequalities. This approach is embedded in the ideal of corrective justice as opposed to traditional welfare policies, based on the distribution of equity.

The EU legal order has adopted the term ‘positive action’ to tackle underlying structural and historical barriers that perpetuate disadvantages for certain groups. However, ‘positive discrimination’ and ‘reverse discrimination’ are often used in place of ‘positive actions’ in the EU context. The terms should not be confused or used interchangeably as they reflect quite different concepts and procedures. The inconsistent use of all these terms is unhelpful and ultimately damaging to the pursuit of (substantial) gender equality. The use of positive action under EU law is not only consistent with the realization of substantial equality but it goes further than the narrow concept of formal equality. Positive action measures are not considered forms of discrimination; rather they are specific advantages designed to balance past and/or present discrimination. Nevertheless, the meaning of positive action is contested and, as noted by Waddington and Bell, the term ‘specific advantages’ provides few clues as to where the boundary lies between (unlawful) discrimination and (lawful) positive action.<sup>28</sup>

The term ‘quota’ often is used to address gender representation rules and has become a synonym for positive action measures especially in relation to gender representation on corporate boards. This term is extremely controversial and highly contested. The idea of ‘quotas’ rattles feminist thinking; women are divided on the merit of such measures. This is evidenced by internal disagreements in the Commission. Female commissioners (including Catherine Ashton, Connie Hedegaard, Cecilia Malmström and Neelie Kroes) have voiced their opposition to the proposed EU directive because they believe that quotas are not the best way to achieve equality. The assumption is that quotas lead to automatic appointment

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<sup>26</sup> S. Fredman, ‘Reversing Discrimination’, 113 *Law Quarterly Review* (1997), p. 575-600. See also D. Sabbagh, ‘Affirmative Action’, in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).

<sup>27</sup> G. Selanec, ‘executive summary’, in S. Selanec and L. Senden (eds.), *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards* (European Network of Legal Experts in the Field of Gender Equality and European Commission, 2012).

<sup>28</sup> L. Waddington and M. Bell, ‘Exploring the Boundaries of Positive Action under EU Law: A Search for Conceptual Clarity’, 48 *Common Market Law Review* (2011), p. 1503-1026, 1506.

regardless of merits or qualification and no qualified woman wants to be appointed to a post because of her gender.

Quotas are one of the many legal tools available to implement positive action measures. Essentially, quotas are numerical targets set to be reached within a certain time limit, but there are variations in the legal devices.<sup>29</sup> For example, quotas do not always involve preferential treatment and their strength depends on the measure chosen to achieve the numerical goal. Notably, the forms of gender quotas which have been adopted in Europe are framed in gender neutral terms. They are designed to require that no one sex can be over-represented, typically over a 60% threshold. As we will see, the EU legal framework limits the effectiveness of quotas so that they can rarely be mandatory. Therefore, no one can be automatically appointed based on his or her gender.

The term ‘parity’ (*la parité*) is used in France, where the so-called ‘gender-parity’ quotas are not merely concerned with increasing women’s representation in various domains, but more importantly they are contributing to cement the democratic legitimacy of institutions which impact all citizens.<sup>30</sup> Balanced representation is argued to be advancing the right of all citizens. The promotion of gender parity in ‘positions of professional and social responsibilities’<sup>31</sup> builds on fundamental constitutional basis, which underpins the legitimacy of the republic and enhances public trust in financial and economic governance.<sup>32</sup>

### §3. THE EU LEGAL FRAMEWORK ON POSITIVE ACTIONS

For some time the EU has been interested in intervening to redress the continuing gender gap in business leadership. Soft measures were adopted with a view to developing a strategy in relation to gender representation beyond the political sphere. The Recommendation of 13 December 1984 provides that Member States are entitled ‘to adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a

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<sup>29</sup> S. Walby ‘Gender Quotas for Boards of Directors: Gendering Economic Governance in a Time of Financial Crisis’, presented at Council for European Studies Conference, Amsterdam, 26 June 2013, p. 16; G. Selanec, in S. Selanec and L. Senden (eds.), *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, p. 5.

<sup>30</sup> J.C. Suk, 93 *Boston University Law Review* (2013), p. 1125.

<sup>31</sup> Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, Article 1.

<sup>32</sup> J.C. Suk, ‘Gender Parity and State Legitimacy: From Public Office to Corporate Boards’, 10 *International Journal of Constitutional Law* (2012), p. 449-464.



better balance between the sexes in employment<sup>33</sup> in the public and the private sectors. The Recommendation of 2 December 1996 urged Member States to promote balanced participation of women and men in decision-making processes.<sup>34</sup> It aimed to ‘encourage the private sector to increase the presence of women at all levels of decision-making, notably by the adoption of, or within the framework of, equality plans and positive action programmes’.<sup>35</sup> Unfortunately, these soft measures have not yielded the anticipated results. The share of women on corporate boards grew from 8.5% in 2003 to 11.8% in 2010, and was described as ‘unacceptably slow’ by the European Commission.<sup>36</sup>

In 2011, the EU Commissioner for Justice and Fundamental Rights, Viviane Reding, launched the programme titled *Women on the Board Pledge for Europe*, calling on large companies to increase women’s presence at the board level to 30% by 2015 and to 40% by 2020.<sup>37</sup> Reding promised to consider legislative action if the self-regulatory initiative did not produce results by March 2012. However, a year later only 24 companies had signed the pledge, making it clear that a ‘soft’ EU led approach, would not work.<sup>38</sup> At the deadline, EU figures revealed that 91.9% of executive board members, 85% of non-executive board members and 96.8% of the boardroom chairs were men. The ‘glass ceiling’ remained intact; self-regulation had had little effect. Therefore, on 14 November 2012, the Commission adopted a proposal for a directive designed to set up a series of measures to improve the gender balance among non-executive directors of companies listed on stock exchanges.

The goal of the proposed directive is:<sup>39</sup>

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<sup>33</sup> Council Recommendation of 13 December 1984 on the promotion of positive action for women, [1984] OJ L 331/34.

<sup>34</sup> Council Recommendation of 2 December 1996 on the balanced participation of women and men in the decision-making process, [1996] OJ L 319/11.

<sup>35</sup> Ibid., I, para. 4, d.

<sup>36</sup> European Commission, *Women and Men in Leadership Positions in the European Union* (European Union, 2013).

<sup>37</sup> Europa Rapid Press Release, *EU Justice Commissioner Reding challenges business leaders to increase women’s presence on corporate boards with ‘Women on the Board Pledge for Europe’*, 1 March 2011, MEMO11/124; Europa Rapid Press Release, *EU Justice Commissioner Viviane Reding meets European business leaders to push for more women in boardrooms*, 1 March 2011, IP/11/242.

<sup>38</sup> See Europa Rapid Press Release, *European Commission weighs options to break the ‘glass ceiling’ for women on company boards*, 5 March 2012, IP/12/213.

<sup>39</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, 14 November 2012, COM(2012) 614 final, Article 1.

to ensure a more balanced representation of men and women among the non-executive directors of listed companies by establishing measures aimed at accelerated progress towards gender balance while allowing companies sufficient time to make the necessary arrangements.<sup>40</sup>

Under Article 4 of the proposed directive, Member States must aim to improve appointment procedures, including the application of a priority rule for the under-represented sex, so that, by 1 January 2020, a minimum proportion of 40% of company board members of publicly listed companies will belong to the under-represented sex.<sup>41</sup> The flip-side of this measure means that no gender can be represented over a threshold of 60%.

The proposed directive exempts a large number of companies from the obligation. These include listed companies where members of the under-represented sex represent less than 10% of the workforce.<sup>42</sup> Also exempted are listed companies which can show that members of the under-represented sex hold at least one-third of all director positions, irrespective of whether they are executive or non-executive.<sup>43</sup> The European Commission argues that despite numerous exceptions, the proposed directive still provides enough constraint to ensure a balanced representation of men and women on the boards of companies in the EU.

The sanction for breach of the legal requirement only considers administrative fines, and prefers the imposition of rules on transparency of selection criteria.<sup>44</sup> The enforcement provisions also permit rejected candidates for boards to bring anti-discrimination suits. The proposed law is a temporary measure, expiring in 2028.<sup>45</sup> In addition to the quota applying to supervisory boards, the proposed rules also require that companies listed on stock exchanges set a self-regulatory soft-quota that aims to have 40% female executive measures by 2020 (or 2018 for public undertakings). Companies must report on progress in their annual reports.

The proposed EU directive on improving the gender balance of non-executive directors is set within a legal framework constituted, on the one hand, by the EU Treaty and the secondary legislation regulating the competence of the EU and, on the other hand, by the judicial

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid., Article 4(1).

<sup>42</sup> Ibid., Article 4(6).

<sup>43</sup> Ibid., Article 4(7).

<sup>44</sup> Ibid., Article 4(3).

<sup>45</sup> See Europa Rapid Press Release, *Women on Boards: Commission proposes 40% objective*, 14 November 2014, IP/12/1205; Europa Rapid Press Release, *Questions and Answers: Proposal on increasing Gender Equality in the Boardrooms of Listed Companies*, 14 November 2012, MEMO/12/860.

interpretation of the substance of this legal framework. This double legal framework provides strict boundaries within which the measure can operate and arguably limits its effectiveness.

First, the proposed directive is confined within the boundaries of the legal framework of the Treaty, namely the area of employment and occupation. The principle of gender equality has been entrenched ‘as one of the central missions and activities of the Union’<sup>46</sup> and as one of its fundamental values.<sup>47</sup> Indeed, Article 2 of the Treaty on European Union (TEU) proclaims that equality is one of the *values* on which the Union is founded. Article 3(3) TEU provides that gender equality and the combatting of discrimination constitute aims of the EU. However, the main article giving the EU competence in the area of gender equality is Article 157 which frames the principle of equal treatment in matters of employment and occupation. Although the Treaty of Amsterdam introduced the concept of ‘gender mainstreaming’,<sup>48</sup> now enshrined in Article 8 TFEU,<sup>49</sup> and places the EU legislator under an obligation to take into account the principle of gender equality when drafting and enacting legislation, the proposed directive has been explicitly adopted on the basis of Article 157 TFEU and particularly its paragraph 4 (the central core of positive action measures) which provides that:

[w]ith a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

This Article specifically addresses matters of employment and occupation. Thus, the Commission is framing non-executive directors of company boards as employees because they are being paid.<sup>50</sup>

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<sup>46</sup> M. Bell, ‘The Principle of Equal treatment: Widening and Deepening’, in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (2<sup>nd</sup> edition, Oxford University Press, 2011), p. 611-639, 629.

<sup>47</sup> S. Koukoulis-Spiliotopoulos, ‘The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Acquis* in Gender Equality’, 1 *European Gender Equality Law Review* (2008), p. 15-24.

<sup>48</sup> M. Pollack and E. Hafner-Burton, ‘Mainstreaming gender in the European Union’, 7 *Journal of European Public Policy* (2000), p. 432-56.

<sup>49</sup> Article 8 TFEU provides that ‘[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’.

<sup>50</sup> J.C. Suk ‘Democratic Deficits and Gender Quotas: The Evolution of the Proposed EU Directive on Gender Balance on Corporate Boards’, *Foundation for Law, Justice, and Society Policy Brief* (2014), <http://www.fljs.org/democratic-deficits-and-gender-quotas>, p. 3.

The Treaty principle is further implemented by Article 3 of the Recast Directive.<sup>51</sup> Positive actions are also mentioned in Article 23 of the EU Charter of Fundamental Rights, which states that ‘the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex’. Both of these instruments relate to employment and occupations reinforcing the arguably artificial link between board directors and employment status. This framing contributes to placing the proposed directive within a narrow policy ambit. It denies the potential for such a measure to contribute to the broader ambition of the development of democratic legitimacy.

Second, the legislative framework, specifically that relating to gender equality in the access to employment, has been interpreted by the Court of Justice of the EU,<sup>52</sup> which has set up a relatively strict test for positive action measures. The proposed directive raises further controversies because the Commission has tried to adhere to the judicial test and in doing so has rendered the proposal quasi-ineffective.

The judicial test has exclusively been set with regard to national positive action measures. It is arguable, yet reasonable, to assume that such a test would also apply to EU measures. Also, the Court has considered mainly positive action measures in the context of employment. In *Kalanke*<sup>53</sup> and *Marschall*<sup>54</sup> the Court considered priority measures adopted by German public employers in the area of employment recruitment. In this context, the Court has laid out strict requirements for lawful positive action measures under EU law: the measure must not apply to either sex, but rather to the under-represented sex; candidates need to be ‘equally qualified’; the measure must not apply in an unconditional and automatic way<sup>55</sup> and should include a saving clause. The so-called ‘saving clause’ guarantees that there is no automatic selection of candidates based exclusively on sex. The problem with the saving clause is that the objective assessment could ultimately lead to a subjective selection. It diminishes significantly the efficiency of gender quotas by essentially prohibiting mandatory selection on

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<sup>51</sup> Article 3 of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast Directive), [2006] OJ L 204/23: ‘Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty [Now Article 157(3) TFEU] with a view to ensuring full equality in practice between men and women in working life’.

<sup>52</sup> See for instance Case C-450/93 *Kalanke v. Freie Hansestadt Bremen*, EU:C:1995:322; Case C-409/95 *Hellmut Marschall v. Land Nordrhein-Westfalen*, EU:C:1997:533; Case C-158/97 *Georg Badeck and others*, EU:C:2000:163.

<sup>53</sup> Case C-450/93 *Kalanke*.

<sup>54</sup> Case C-409/95 *Marschall*.

<sup>55</sup> *Ibid.*, para. 32; Case C-407/98 *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, EU:C:2000:367, para. 52.

grounds of sex.<sup>56</sup> As a result, a binding quota rule seeking a certain proportion of women in a given employment position by a specific date *regardless of qualification* would be in breach of Article 157(4) TFEU.

The link between employment status and directors' duties is further reinforced by the judicial test which the proposed directive is adopting. In accordance with the principles set by the Court in *Kalanke* and *Marschall*, priority can be given to the candidate of the under-represented sex, if he or she is equally qualified to a candidate of the other sex in terms of suitability, competence and professional performance.<sup>57</sup> It is difficult to compare 'qualification' of board members, who might have been selected on the basis of their network connections, their personal skills or even their unique personality. Traditional employment criteria such as seniority, diplomas and experience might not carry the same weight as in the case of employment proper. But even in the case where equal qualification can be identified, it is always possible that 'an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex'.<sup>58</sup> However, in the spirit of transparency, the listed company must inform the unsuccessful candidate, upon request, of the criteria that led to the 'objective assessment'.<sup>59</sup>

The Court has further added a proportionality test to positive action measures, stating that 'derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued'.<sup>60</sup> Whether the proposed directive respects the proportionality test is another controversial issue. The question regarding the respect of the principle of proportionality remains a difficult one, notwithstanding the less-than-clear position of the Court of Justice. Some have argued that the proposed directive is 'clearly' incompatible with the principle of proportionality,<sup>61</sup> since compulsory gender quotas are illegal under the Court's principles regulating positive action measures. However, as

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<sup>56</sup> J.C. Suk, 'Democratic Deficits and Gender Quotas: The Evolution of the Proposed EU Directive on Gender Balance on Corporate Boards', *Foundation for Law, Justice, and Society Policy Brief* (2014), <http://www.fljs.org/democratic-deficits-and-gender-quotas>, p. 4.

<sup>57</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, 14 November 2012, Article 4(3).

<sup>58</sup> *Ibid.* Again this is in accordance with the EU case law on positive action.

<sup>59</sup> *Ibid.*, Article 4(4).

<sup>60</sup> Case C-476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2002:183, para. 39.

<sup>61</sup> M. Szydło, 21 *European Law Journal* (2013), p. 110-114.

explained above, the requirement of equal qualification together with the existence of a saving clause under the proposed directive means that quotas are essentially non-mandatory.

Regardless of whether the Court's principle would extend to a company's board of directors, the proposed directive does not impose an obligation of result on Member States to reach a minimum of 40% women on company boards. Instead, the proposal imposes an obligation of effort on the Member States.<sup>62</sup> The legal obligation is concerned with the adjustment of recruitment and appointment procedures of listed companies to make sure that criteria of clarity, transparency and gender neutrality are included. Sanctions are linked to the breach of these criteria, not to the non-achievement of the 40% target. Proportionality should therefore be considered to be respected. In addition, the temporality, the limited personal scope of the proposal and the fact that the EU's previous 'soft' self-regulatory approach has failed, indicate that the proposal is likely to be considered a *proportionate*, yet weak, measure.

The proposed directive ticks all the boxes set out by the Court. The fact that the EU measure applies only to the 'under represented sex' and aims for equality of opportunity rather than equality of result indicates that it is within the conditions of a lawful positive action measure under Article 157(4) TFEU and the Court's case law. However, the focus of the Court consistently has been to consider whether a particular norm removes barriers to opportunities for women. Seen in this light, the case law of the Court essentially limits the use of gender quotas as a tool to increase women's number in any particular employment field, and to redress past disadvantages. Thus, there is real tension between the test set out by the Court of Justice and the potential of the proposed directive. The Court of Justice has been trying to limit quotas on the ground that they derogate from the principle of gender equality. However, the aim of the proposed directive is arguably not limited to increasing women's numbers in corporate boards but it has the potential to create an environment of democratic legitimacy in economic and financial institutions.<sup>63</sup> This potential might well be reached following the adoption of the 2013 European Parliament Resolution proposing amendments to the Commission's proposal.<sup>64</sup> Thus, the proposed directive might prove to be more 'daring'<sup>65</sup> than

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<sup>62</sup> L. Senden and M. Visser, 1 *European Gender Equality Law Review* (2013), p. 27.

<sup>63</sup> J.C. Suk, 'Democratic Deficits and Gender Quotas: The Evolution of the Proposed EU Directive on Gender Balance on Corporate Boards', *Foundation for Law, Justice, and Society Policy Brief* (2014), <http://www.fljs.org/democratic-deficits-and-gender-quotas>.

<sup>64</sup> European Parliament legislative resolution of 20 November 2013 on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, (COM(2012)0614 – C7-0382/2012 –



one might think at first sight. This is the case not because the proposed directive pushes the boundaries set by the Court but rather because by proposing to improve gender representation in economic and financial leadership, it contributes to shifting the debate from gender equality to democratic legitimacy of large private companies which impact citizens' lives. Nevertheless, (at this stage at least) the proposal remains very mild in view of the legal developments taking place in some Member States, including France.

#### §4. POSITIVE ACTION MEASURES A LA FRANÇAISE?

France is an interesting case because it traditionally has favoured formal equality. Recent legal reforms, however, show that the French legislator is embracing a broader concept of substantial equality comparable to that found in Scandinavian countries. Similarly to the EU development in this area, French legislation started with democratic representation, but has expanded well beyond that and now extends into public services, private companies and banks. The French legal reforms are linked to the increasing collaboration taking place between the government and private companies in economic and social decision-making.<sup>66</sup> The constitutional law reform of 23 July 2008 amended the French Constitution to make the promotion of gender parity a fundamental pillar of the Republic.<sup>67</sup> Article 1(2) of the Constitution now provides that 'statutes shall promote equal access by women and men to elective offices and posts as well as to professional and social positions.'<sup>68</sup> The constitutional reform builds on previous legislation aimed at improving gender equality in the spheres of parliamentary representation<sup>69</sup> and positions in public office.<sup>70</sup> On this basis, the French legislator has now adopted an array of legal measures.<sup>71</sup> All of these developments indicate

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2012/0299(COD)). See also J.C. Suk, 'Democratic Deficits and Gender Quotas: The Evolution of the Proposed EU Directive on Gender Balance on Corporate Boards', *Foundation for Law, Justice, and Society Policy Brief* (2014), <http://www.fljs.org/democratic-deficits-and-gender-quotas>, p. 5-8.

<sup>65</sup> M.V.M. van Beek, 'Vers un meilleur équilibre hommes-femmes parmi les administrateurs non exécutifs des sociétés cotées en bourse, Initiative visionnaire ou téméraire ?', 1 *Revue du Droit de l'Union Européenne* (2013), p. 53-83.

<sup>66</sup> J.C. Suk, 10 *International Journal of Constitutional Law* (2012), p. 460-462.

<sup>67</sup> Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, Article 1.

<sup>68</sup> Our translation. The French text states: 'La loi favorise l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives, ainsi qu'aux responsabilités professionnelles et sociales'.

<sup>69</sup> Loi n° 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives. E. Lépinard, 9 *Public & Gender* (2013), p. 278.

<sup>70</sup> Loi n° 2001-397 du 9 mai 2001 relative à l'égalité professionnelle entre les femmes et les hommes requires the use of a balanced gender representation in jury selection, committees and advisory bodies representing the administration.

<sup>71</sup> Loi n° 2012-347 du 12 mars 2012 relative à l'accès à l'emploi titulaire et à l'amélioration des conditions d'emploi des agents contractuels dans la fonction publique, à la lutte contre les discriminations et portant

that gender parity is central to building democratic legitimacy for all institutions, whether public or private, that impact citizens' lives.<sup>72</sup>

In the French private sector, women represent 28% of the boards of directors of the CAC 40<sup>73</sup> companies, though none of the Chief Executive Officers (CEOs) are women. Moreover, only 10% of executive committee members are women and 32% of companies have no women on their executive committees. Within the SBF 120,<sup>74</sup> only 26% of women are on boards of directors and just one of them is CEO. Women represent only 12% of executive committees and 36% of companies have no women in their executive committees.<sup>75</sup>

The obligation to ensure the presence of women on boards of companies was codified in 2006,<sup>76</sup> but was found to be contrary to the Constitution, which did not allow for 'the search for a balanced access of women and men in responsibilities other than in elective political office'.<sup>77</sup> The constitutional law reform of 23 July 2008 remedied this problem by introducing a principle of equal access for men and women in professional responsibilities. The law of 27 January 2011,<sup>78</sup> somewhat modified by the law of 4 August 2014,<sup>79</sup> requires balanced representation of women and men on boards of directors and supervisory boards of company: no gender can be represented beyond a 60% threshold.

As a prerequisite to discussing the French measure aimed at increasing the number of female directors in the private sector, it is useful to give a brief overview of French company law in the European context and to briefly analyse the composition of French boards. Even if EU

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diverses dispositions relatives à la fonction publique. Article 52 requires 50% representation of each sex in the public service. Articles 30 and 79 of Loi n° 2013-672 du 26 juillet 2013 de séparation et de régulation des activités bancaires requiers gender balanced participation at the High Council for Financial Stability (*Haut Conseil de stabilité financière*). Loi n° 2014-873 du 4 août 2014 provides an array of measures requiring equality in the public sector (including sports, Chamber of commerce, industry and agriculture as well as at Regional Authorities and Independent Administrative Authorities).

<sup>72</sup> J.C. Suk, 10 *International Journal of Constitutional Law* (2012).

<sup>73</sup> The CAC 40 index, which was created in 1988, is the main stock index in Paris. It includes 40 stocks selected among the hundred capitalization of the core market. CAC 40 stands for *Cotation Assistée en Continu*.

<sup>74</sup> The SBF 120 index stands for *Société des Bourses Françaises 120 Index*. It was created in 1993 and it is a stock index in France. It is based on the 120 most actively traded stocks listed in Paris.

<sup>75</sup> Ministère des droits des femmes, *Semaine de l'égalité professionnelle*, 1<sup>re</sup> éd., 14 au 20 octobre 2013, p. 12.

<sup>76</sup> Loi n° 2006-340 du 23 mars 2006 relative à l'égalité salariale entre les femmes et les hommes, Title III, Articles 21 and 22; J.-E. Schoettl, 'La loi relative à l'égalité salariale entre les femmes et les hommes devant le Conseil constitutionnel (suite et fin)', 75 *Les Petites Affiches* (2006), p. 8-21, 15-16.

<sup>77</sup> Conseil Constitutionnel, 16 March 2006, déc. n° 2006-533 DC – Loi relative à l'égalité salariale entre les femmes et les hommes, JO 24 March 2006, p. 4446, considérant n° 15 (authors' translation).

<sup>78</sup> L. n° 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle.

<sup>79</sup> Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes.

directives have attempted to instigate a convergence of company laws, each country has retained its special features.<sup>80</sup> The harmonization of standards in company law is actually very difficult to implement.<sup>81</sup> For instance, the role played by case law, the extent of shareholders' protection<sup>82</sup> and rules on public and private company formation all vary greatly across the Member States.<sup>83</sup> This article only considers public limited companies (Plc), which exist both in France and in the UK. French public companies are called *société anonyme*<sup>84</sup> and may be formed as a publicly held company (*société avec offre au public de titres financiers*) or as the most common non-publicly held company (*société sans offre au public de titres financiers*).<sup>85</sup>

There are two kinds of company boards in France: boards of directors and supervisory boards depending on the type of Plc adopted, namely 'monistic' (unitary board system) or 'dualistic' (dual board system). The unitary board system includes a board of directors, a chairman of this board and a managing director. The functions of chairperson and managing director can be separated or not.<sup>86</sup> Although Article L. 225-51-1 of the Commercial Code states that '[t]he general direction of the company is assumed, under his responsibility, either by the chairman of the board, or another person appointed by the board with the title of managing director',<sup>87</sup> 75% of such companies have unified these two functions.<sup>88</sup> According to Article L. 225-35 of the Commercial Code, the board of director determines the activity of the company and oversees their implementation.

In contrast, the dual board system includes both an executive board and a supervisory board.<sup>89</sup> According to Article L. 225-64 of the Commercial Code, the executive board is vested with

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<sup>80</sup> A. Cotiga, *Le droit européen des sociétés, Compétition entre les systèmes juridiques dans l'Union européenne*, (Larcier, 2013), p. 31. .

<sup>81</sup> V. Magnier, *Rapprochement des droits dans l'Union européenne et viabilité d'un droit commun des sociétés*, (LGDJ, 1999), p. 5.

<sup>82</sup> M. Siems and D. Cabrelli, 'Form, Style and Substance in Comparative Company Law', in M. Siems and D. Cabrelli (eds.), *Comparative Company Law, A Case-Based Approach* (Hart Publishing, 2013), p. 363-387.

<sup>83</sup> See M. Andenas and F. Wooldridge, *European Comparative Company Law* (Cambridge University Press, 2009), p. 52.

<sup>84</sup> See D. French, S. Mayson and C. Ryan, *Company Law* (30<sup>th</sup> edition, Oxford University Press, 2013-2014), p. 58. The Public limited company is the largest trading structure which may offer shares for sale to the public. See C. Taylor, *Company Law* (2<sup>nd</sup> edition, Pearson, 2013), p. 9.

<sup>85</sup> See M. Andenas and F. Wooldridge, *European Comparative Company Law*, p. 64.

<sup>86</sup> Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles réglementations économiques, Article 106.

<sup>87</sup> The French provisions are not gender neutral: '*La direction générale de la société est assumée, sous sa responsabilité, soit par le président du conseil d'administration, soit par une autre personne physique nommée par le conseil d'administration et portant le titre de directeur général*'.

<sup>88</sup> Autorité des Marchés Financiers, 'Rapport sur le gouvernement d'entreprise et la rémunération des dirigeants' AMF (2013), p. 7.

<sup>89</sup> M. Cozian, A. Viandier and F. Deboissy, *Droit des sociétés* (27<sup>th</sup> edition, LexisNexis, 2014), p. 373; P. Merle, *Droit commercial, Sociétés Commerciales* (18<sup>th</sup> edition, Dalloz, 2015), p. 557.

the broadest powers to act in all circumstances on behalf of the company. Powers are to be used in accordance with the objectives of the company and within the legal limits imposed to the supervisory board and shareholders' meetings. The role of the supervisory board differs from the board of directors. According to Article L. 225-68 of the Commercial Code, the supervisory board exercises permanent control over the management of the company. In France, public limited companies with a unitary board of directors are the most frequently used.<sup>90</sup> They represent 80% of companies against 20% for public limited companies with supervisory boards.<sup>91</sup>

The law of 27 January 2011 as amended by the law of 4 August 2014 enforces the establishment of balanced representation of men and women on boards of directors and supervisory boards of public limited companies and partnerships limited by shares<sup>92</sup> through the introduction of quotas.<sup>93</sup>

The 2011 legislation is to be applied in three distinct progressive stages. First, if at the date of publication of the law, being 28 January 2011, one of the sexes was not represented on the board of directors or supervisory board, at least one representative of that sex should be appointed at the next ordinary general meeting designed to approve the appointment of directors or members of a supervisory board.<sup>94</sup> Second, and for companies whose shares are admitted to trading on a regulated market, the proportion of directors or members of the supervisory board of each sex cannot be under 20% at the end of the first annual general meeting following 1 January 2014.<sup>95</sup> This stage is only temporary and applies only to listed companies.<sup>96</sup> The obligation of gender balance for non-listed companies has been postponed to 2017. The likely reason for this is that it is easier to enforce gender quotas for listed

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<sup>90</sup> C. Perchet, 'Pertinence et pérennité de la SA avec conseil d'administration', *Bulletin Joly Sociétés* (2009), p. 440.

<sup>91</sup> Autorité des Marchés Financiers, 'Rapport sur le gouvernement d'entreprise et la rémunération des dirigeants' AMF (2013).

<sup>92</sup> Loi n° 2011-103 du 27 janvier 2011; Regarding the board of directors, Article L. 225-17, al. 2 of the Commercial Code; Regarding the supervisory board, Article L. 225-69, al. 2 of the Commercial Code concerning the public limited companies and Article L. 226-4, al. 2 concerning the partnership limited by shares.

<sup>93</sup> M.-J. Zimmermann, 'L'égalité entre les femmes et les hommes : un combat permanent', in N. Pilhes et G. Pennequin, *Femmes-Hommes, enfin l'égalité ?* (Eyrolles, 2012), p. 121-128, 125; 'Femmes administrateurs: la victoire passe par les quotas !', *Dossier Femmes et politiques publiques, L'ENA hors les murs* (2014), p. 7-8 ; B. François, 'Femmes administratrices', *Revue des sociétés* (2014), p. 466-467.

<sup>94</sup> Loi n° 2011-103 du 27 janvier 2011, Article 5, II, al. 2.

<sup>95</sup> Ibid., Article 5, II, al. 1.

<sup>96</sup> It is important not to confuse 'Public limited companies' (Plc) and 'listed companies'. Indeed, 'listed companies' are a kind of Plc. These companies, listed on the stock exchange, may trade their shares. See C. Taylor, *Company Law*, p. 11.

companies because they are visible to the public. Moreover, larger companies are considered to be models to be emulated by smaller companies over time. Finally, by 1 January 2017, the proportion of members of the board of directors or supervisory board of each sex may not be under 40% for applicable companies.<sup>97</sup> Applicable companies include both companies whose shares are admitted to trading on a regulated market, and so-called ‘large’ companies. The latter are companies that have employed an average of at least 500 permanent employees for the first of the three consecutive years from 1 January 2017 and have net sales or total assets of at least € 50 million. However, the law of 4 August 2014 extends the scope of the measure by lowering the threshold of permanent employees used to qualify a ‘large’ company to 250 permanent employees from 1 January 2020. In other words, companies whose shares are not admitted to trading on a regulated market and that employ between 250 and 499 permanent employees and have net sales or total assets of at least €50 million have until 2020 to comply with the 40% gender quota.<sup>98</sup> Any appointment that contravenes this legal rule is void. However, decisions adopted by the board are not affected by such nullity and therefore remain valid.<sup>99</sup>

In addition, the boards of companies which have reached certain threshold criteria<sup>100</sup> must submit a non-financial report on measures adopted in favour of gender equality to the general meeting of shareholders.<sup>101</sup> The French Securities and Markets Authority (*Autorité des marchés financiers*) also has an important ‘role of impulsion’<sup>102</sup> on non-financial reporting through two recommendations designed to enhance sustainable corporate governance.<sup>103</sup>

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<sup>97</sup> Loi n° 2011-103 du 27 janvier 2011, Article 5, I.

<sup>98</sup> Loi n° 2014-873 du 4 août 2014 Article 67, III.

<sup>99</sup> Loi n° 2011-103 du 27 janvier 2011, Article 1, II, last paragraph (future Article L. 225-18-1, al. 2 of the Commercial Code) : ‘*Toute nomination intervenue en violation du premier alinéa et n’ayant pas pour effet de remédier à l’irrégularité de la composition du conseil est nulle. Cette nullité n’entraîne pas celle des délibérations auxquelles a pris part l’administrateur irrégulièrement nommé*’; See H. Le Nabasque, ‘La sanction des délibérations adoptées par un conseil d’administration irrégulièrement composé’, *Le conseil d’administration*, ‘numéro spécial’, *Revue Trimestrielle de Droit Financier* (2013), p. 108, 110.

<sup>100</sup> These are concerned companies whose shares are admitted to trading on a regulated market as well as, according to Article R. 225-104 of the Commercial Code, companies which have a net sales or total assets of at least € 100 million and whose average number of permanent employees exceeds 500.

<sup>101</sup> Article L. 225-102 of the Commercial Code requires the presence of specific information in the report, in compliance with Article R. 225-105-1, I, 1°, f) of the Commercial Code.

<sup>102</sup> C. Malecki, *Responsabilité sociale des entreprises : perspectives de la gouvernance d’entreprise durable*, (LGDJ, 2014), p. 168.

<sup>103</sup> Autorité des Marchés Financiers, recommandations n° 2010-13 du 2 décembre 2010 et n° 2013-18 du 5 novembre 2013.

## §5. DOES THE FRENCH MODEL COMPLY WITH THE EU LEGAL FRAMEWORK?

Whether any aspects of the French rule on balanced participation may be deemed illegal under the EU framework is important for determining whether a similar model could be adopted by other EU countries. There are three main differences between the French legislation on the one side and the EU legal framework and proposed EU directive on gender-balanced representation in company boards on the other.

First, the scope of the French and the EU measures are vastly different which means that both their real and their potential impact as a role model differs drastically. In contrast to the French legislation, the proposed directive applies only to ‘non-executive directors’: ‘any member of a unitary board other than an executive director and any member of a supervisory board in a dual board system’.<sup>104</sup> Thus, the ‘executive directors’ who are ‘any member of a unitary board who is engaged in the daily management of the company and any member of a managerial board in a dual board system’<sup>105</sup> are exempt from the obligation of gender balance representation. Non-executive directors are generally less visible and have less influence on the company policies compared to executive directors. The potential impact of non-executive directors as a form of role model is therefore limited.<sup>106</sup> Although Article 5 of the proposed EU directive provides the additional element of the self-regulatory ‘flexi-quota’, this does not have the same legal status as the wider reaching French measure.

The French measure applies to executive as well as non-executive directors; therefore, it would appear that the French model has a wider scope than the proposed directive. As such, it can be argued that the more extensive French model should be viewed as an example for the European institutions looking to legislate beyond the narrower scope of the EU proposal.<sup>107</sup> Indeed, Viviane Reding said that France alone accounts for over 40% of the total variation observed in the European Union between October 2010 and January 2012.<sup>108</sup> Therefore, the participation of France in the field of balanced representation in the European Union is significant.

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<sup>104</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, 14 November 2012, Article 2(5).

<sup>105</sup> Ibid., Article 2(4).

<sup>106</sup> L. Senden and M. Visser, 1 *European Gender Equality Law Review* (2013), p. 32-33.

<sup>107</sup> J. Chacornac, ‘L’équilibre hommes-femmes parmi les administrateurs non exécutifs dans les sociétés cotées : la France en avance sur le droit de l’Union’, 13 *Lettre Creda-Sociétés* (2013), p. 1.

<sup>108</sup> F. Agnès et I. Lefort, *100 ans de combats pour la liberté des femmes* (Flammarion, 2014), p. 347.



In addition, the type of companies affected by positive action measures differs in the French and the EU proposal where not all companies are affected. In contrast to the French legislation, unlisted companies are completely excluded under the EU proposal. The rationale behind this restriction is that:

Companies listed on stock exchanges enjoy a particular economic importance, visibility and impact on the market as a whole (...). These companies set standards for the economy in its entirety and their practices can be expected to be followed by other types of companies. The public nature of listed companies justifies that they be regulated to a greater extent in the public interest.<sup>109</sup>

Even among listed companies, selection is still performed under the EU approach. Small and medium-sized enterprises (SMEs), ‘which employ less than 250 persons and have an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million’ are not concerned by the proposed directive.<sup>110</sup> These restrictions may have been made to the text in order to ensure a quick and easy application. The French legislation only indirectly excludes small companies based on certain threshold. However, the French law applies to boards of directors and supervisory boards of public limited companies and partnerships limited by shares. This means that the companies concerned are those that have employed an average of at least 500 permanent employees - 250 in 2020 - for the first of the three consecutive years and have a net sales or total assets of at least €50 million. The broad scope of the French legislation signals that gender balanced participation is the principle and that exception only applies in restricted areas.

The second difference concerns the sanctions imposed on companies which fail to reach the 40% target. Admittedly, neither the French law nor the proposed directive is very effective at compelling gender balance, even if the French law is marginally more convincing. According to the proposed EU directive, the choice of sanctions is left to the Member States, provided that these sanctions are effective, proportionate and dissuasive.<sup>111</sup> However, Article 6(2) of the proposed directive provides two potential measures: (i) administrative fines and (ii) nullity

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<sup>109</sup> Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, 14 November 2012, recital n° 17.

<sup>110</sup> Ibid., Articles 2(8) and 3.

<sup>111</sup> Ibid., Article 6.

or annulment of the appointment or of the election of non-executive directors declared by a judicial body. The fact that there are no mandatory and firm sanctions defined by the proposed directive is perhaps the proposal's greatest weakness. In turn, Member States have a broad discretion concerning the adoption of adequate sanctions. The lack of harmonization may lead to the development of very different treatment of offending companies across the Member States. The weak sanctions under the EU proposal have been criticized by the European Parliament, which called for obligatory and not just indicative sanctions. The European Parliament even offered to add 'the exclusion from public procurement'<sup>112</sup> to the list of sanctions.

This apparent 'lack of teeth' is in contrast to the existing French legislation. A breach of the obligation under the French rule can lead to the appointment of a director to be cancelled, although it does not result in cancellation of the deliberations which have taken part as regards the irregularly appointed member. In some cases, if the board of directors or supervisory board is not composed according to the legislation, payment of compensation may be suspended until it is regularized. The sanctions considered under French legislation are structural and arguably have the potential to be more efficient, and therefore more persuasive than the weaker EU proposal. Notwithstanding, the French law and the proposed directive are a far cry from the sanction imposed for breach of gender balance representation under Norwegian company law, which authorizes courts to dissolve the company.<sup>113</sup> Ironically, the ineffectiveness of both the French law and the proposed directive at compelling gender balance might go a long way in explaining their compatibility with the EU legal framework as laid out by the Court.

Indeed, this above argument links to the third difference between the French law and the proposed EU directive and which lies in the interpretation of the automatic rule and its compatibility with the principle of proportionality as set by the Court of Justice.<sup>114</sup> According to the Court's interpretation, positive action measures must not apply to either sex, but rather to the under-represented sex; candidates need to be 'equally qualified'; the measure must not

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<sup>112</sup> Europea Rapid Press Release, *Cracking Europe's Glass Ceiling: European Parliament backs Commission's Women on Boards proposal*, 20 November 2013, IP/13/1118.

<sup>113</sup> Norwegian Publicly Listed Companies Act, Paragraph 16-15(1)(2); Paragraph 16-16.

<sup>114</sup> See Case C-450/93 *Kalanke*; and Case C-409/95 *Marschall*.

apply in an unconditional and automatic way;<sup>115</sup> and should include a saving clause. Thus, the Court's test on positive action means that it is almost impossible to render gender quota mandatory.

On the one hand, the French measure, in accordance with EU law, applies to the 'under represented sex', meaning it does not apply to either sex per se. On the other hand, the rule could appear to be drafted to apply in an unconditional and automatic way, by lacking a saving clause. In addition, the French law does not mention the consideration of equal qualification for appointment. Is it therefore possible that the French measure breaches the EU requirement for a saving clause? Is the French measure a 'quota' potentially incompatible with the EU legal framework because it might be too rigid? Or can it be considered a form of (legal) positive action? The French legislation on gender balance in company boards must be distinguished from the EU framework on positive action. It results from an overarching process of democratic legitimization. The French measure is not merely a quota but it proceeds from a constitutional reform establishing gender parity as fundamental to the characteristic of the Republic. Gender balance in corporate boards goes beyond advancing women's right: according to the Constitution, it is essentially about 'legitimizing corporations' exercise of public power'.<sup>116</sup> Thus, the ambit of the French law is broader than the EU legal framework on positive action relating to employment and occupation.

Nevertheless, should one consider the French rule from a narrow perspective and put it to the test of the EU legal framework, it should be highlighted that the rule does not apply to all French companies, but only to those listed on the stock exchange and which have a high turnover and a large number of employees. In other words, it applies to the most visible companies and also to those most likely to operate across borders. The French legislation in that sense is not too rigid because the automaticity of the rule is not universal.

In addition, the requirement for companies to achieve a 40% proportion of women on a company board does not necessarily mean that they must prefer women unconditionally. Indeed, they can employ women who are better qualified compared to their male applicants. This can be achieved by looking more widely for female applicants. They can also consider

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<sup>115</sup> Case C-476/99 *Lommers*, para. 32; Case C-407/98 *Abrahamsson*, para. 52.

<sup>116</sup> J.C. Suk, 10 *International Journal of Constitutional Law* (2012), p. 463.

redefining their qualification criteria to fit the tasks of the board members better. Only a rule which governs the individual employment decision can ever be unconditional and automatic and the French legislation does not contain such a rule about the individual appointment decision.

Moreover, it must be noted that the ambiguity of the Court's guidelines regarding the distinction between lawful positive actions and other unlawful measures leaves space for wider interpretation of the concept of positive action. It also provides a space for these measures to truly serve the general public interest, participatory democracy and fairness. The Court has recognized that equal opportunity and preferential treatment can combat gender stereotypes.<sup>117</sup> The Court has also accepted that the public interest might demand broader positive action measures.<sup>118</sup> Other academics have also argued that positive actions measures have a wide potential and might cover a broad spectrum of practices.<sup>119</sup> In this context, it is important to recall that the French law is part of a general framework for gender equality, which goes beyond the interest of one gender. It is implementing the concept of parity which is about the balanced participation of both genders.<sup>120</sup> Ultimately, the French law is about improving democratic legitimacy of public and private institutions that impact on citizens' lives.

Further, the Court of Justice's decisions on positive action measures almost exclusively address the context of employment law, where merit-based assessment of qualification is at the heart of the decision making process for appointing an employee. Executive and non-executive directors of companies are not necessarily appointed on the basis of their qualifications. Their professional skills, network and subjective personal characteristics matter. In this light, company board directors are not quite employees but nor do they yet belong to political representation. Therefore, it remains unclear that the Court's prescriptions

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<sup>117</sup> Case C-409/95 *Marshall*, cited by L. Senden and M. Visser, 1 *European Gender Equality Law Review* (2013), p. 21.

<sup>118</sup> Joined Cases C-250 and 268/09 *Vasil Ivanov Georgiev v. Tehnicheski universitet - Sofia, filial Plovdiv*, EU:C:2010:699, cited by L. Waddington and M. Bell, 48 *Common Market Law Review* (2011).

<sup>119</sup> C. McCrudden, 'Rethinking positive action', 15 *Industrial Law Journal* (1986), p. 219-243; S. Fredman, 'Affirmative action and the European Court of Justice: a critical analysis', in Shaw (ed.), *Social law and policy in an evolving European Union* (Hart Publishing, 2000), p. 179.

<sup>120</sup> J.C. Suk, 10 *International Journal of Constitutional Law* (2012).

on positive action measures apply in the context of corporate boards. In *Abrahamsson*<sup>121</sup> and *Badeck*<sup>122</sup> the Court even recognizes the limit of the ‘equal qualification’ condition.

Finally, the French law falls short of the far-reaching Norwegian company rule. The Norwegian gender quota rule has passed the test of compatibility with European Economic Agreement (EEA) law and therefore the French representation should also be considered compatible with EU law. The European Free Trade Association (EFTA) Surveillance Authority made informal enquiries on the compatibility of the Norwegian gender quota with EEA law. At the time, sex equality law under the EEA was the same as under European Economic Community law.<sup>123</sup> The Norwegian government took the view that regulating company board directors are outside the EEA competences. As the EFTA Surveillance Authority never pursued this further, it arguably created the assumption that indeed the appointment of company directors lies outside of EU competences. In turn, if the Norwegian quota rule is compatible with EU law, then the French law must also be.

Notwithstanding the example of Norway, and within the EU, it appears that the French legislation is suitable to ensure a better balance in the proportion of men and women on the boards of companies. It also appears that the French legislation is not only compatible with the EU legal framework but also goes further than the proposed EU directive in terms of scope, aim and, importantly, as a workable model. Terjesen and Singh found that countries with more women on their corporate boards also tended to have more women in senior management positions.<sup>124</sup> An implication of this finding is that an increase of female directorships may lead to improvements in company policy towards improving the gender balance in senior management positions. The French legislation therefore would serve as a model example beyond the scope of company boards. Thus, if the EU proposal really aims to achieve a better gender balance in companies then its apparent timidity raises the question of its ability to effectively contribute to the goal of gender equality in the wider economic sphere.

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<sup>121</sup> Case C-407/98 *Abrahamsson*.

<sup>122</sup> Case C-158/97 *Badeck*.

<sup>123</sup> R.C. Tobler, in M. Monti et al. (eds.), *Economic Law and Justice in Times of Globalisation*, p. 901-902.

<sup>124</sup> S. Terjesen and V. Singh, ‘Female Presence on Corporate Boards: A Multi-Country Study of Environmental Context’, 83 *Journal of Business Ethics* 1 (2008), p. 55-63.

## §6. CONCLUSION

As noted by the Executive Vice-President of the ‘Women’s Forum’, positive action measures would not be necessary if women were included in economic and political life from the outset.<sup>125</sup> Given the extent of the systematic and persistent lack of equality between men and women across EU Member States, it is apparent that a proportionate response would be a positive action measure in relation to the appointment of company board members. From the above analysis, it can be concluded that the French legislation is clearly wider reaching than the EU proposal. However, the drafting of the French legislation indicates that it may be closer to ‘substantive’ equality and less cautious with the legal criteria set out by the Court in the *Kalanke* and *Marschall* decisions. The French law also falls within a more fundamental constitutional reform which aims at improving citizens’ trust into their institutions and sets out good governance rules that require the participation of all citizens, male and female. By contrast, the proposed EU directive’s timidity risks impairing its ultimate impact. It cannot be viewed as overtly onerous for EU Member States when compared to the French model. Instead, it should be considered as a ‘bare minimum’ that sits comfortably under Article 157 TFEU and Article 23 of the Charter as well as with the jurisprudence of the Court of Justice. Member States are given wide discretions as to how to tackle the issue of gender balance in company boards under the proposed directive. Arguably, Member States might be more influenced by the French legislation than by the EU proposal, especially in the context of regional commercial exchanges. Over time, we may see more states follow France by adopting more extensive and marginally more effective positive action measures. The overall democratic deficit in Europe and in many Member States might also influence these States to adopt far reaching positive action which improves the democratic legitimacy of institutions that impact on the lives of citizens.

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<sup>125</sup> V. Robert, ‘De Deauville à Rangoon, le Women’s Forum se démultiplie’, *Les Echos*, 16 octobre 2013, [http://www.lesechos.fr/16/10/2013/LesEchos/21544-039-ECH\\_de-deauville-a-rangoon--le-women-s-forum-se-demultiplie.htm](http://www.lesechos.fr/16/10/2013/LesEchos/21544-039-ECH_de-deauville-a-rangoon--le-women-s-forum-se-demultiplie.htm).